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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1348

WORLDWIDE CHURCH OF GOD, INC., ET AL.,
PETITIONERS,

vs.

STATE OF CALIFORNIA, ET AL.,
RESPONDENTS.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Three

Motion for Leave to File Brief Amici Curiae and Brief of

NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A.
SYNAGOGUE COUNCIL OF AMERICA
BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS
LUTHERAN CHURCH IN AMERICA
ASSOCIATION OF EVANGELICAL LUTHERAN CHURCHES
BOARD OF CHURCH AND SOCIETY, THE UNITED METHODIST CHURCH
WILLIAM P. THOMPSON, STATED CLERK OF THE GENERAL ASSEMBLY OF THE UNITED PRESBYTERIAN CHURCH IN THE U.S.A.
NATIONAL ASSOCIATION OF EVANGELICALS
NORTHERN CALIFORNIA ECUMENICAL COUNCIL

As Amici Curiae in Support of Granting Certiorari

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As Amici Curiae in Support of Granting Certiorari

The following organizations respectfully move the Court, pursuant to Rule 42 of its Rules, for leave to file the accompanying brief, amici curiae, in support of the petition of Worldwide Church of God et al. for a writ of certiorari in the above captioned matter:

1. The National Council of Churches of Christ in the U.S.A. is a cooperative agency of 32 national Christian religious bodies having an aggregate membership of over forty million. Through its Division of Church and Society, the Council has long been involved in maintaining the constitutional separation of church and state. The Lutheran Church in America, the United Methodist Church and the United Presbyterian Church in the U.S.A. are among the Council's members.

2. The Synagogue Council of America consists of organizations representing the three divisions of the Jewish religion: Orthodox, Conservative and Reformed, at the rabbinic and congregational level. These organizations have a combined constituency of approximately five million Americans. The Council seeks, among other objectives, to preserve the benefits of religious liberty.

3. The Baptist Joint Committee on Public Affairs represents the interests of eight cooperating Baptist conventions in the United States having a combined membership of some 27 million, and which have, throughout their history, evidenced a vital concern for the protection of religious liberty and the maintenance of a separation of church and state.

4. The Lutheran Church in America, headquartered in New York City, is composed of some 6,100 congregations in the U.S. and Canada.

5. The Association of Evangelical Lutheran Churches is headquartered in St. Louis, Missouri. It is composed of some 260 congregations in the United States. Both it and the Lutheran Church in America

have defined their ministries to include concerns for social justice and religious freedom.

6. The Board of Church and Society is one of four official national program agencies of the United Methodist Church. Its particular mandate is the general area of social concern, including specific responsibility for church-state relationships. The United Methodist Church is a major Christian denomination having some 40,000 congregations in the United States.

7. William P. Thompson, stated Clerk of the General Assembly of the United Presbyterian Church in the U.S.A., is the executive officer of the governing body of the United Presbyterian Church, organized in 1706 and consisting of some 8,600 churches throughout the United States. As an organization, it has, throughout its history, demonstrated an active concern for the preservation of religious liberty and the separation of church and state.

8. The National Association of Evangelicals is an association of evangelical organizations, colleges and universities, as well as some 36,000 churches. Together with its affiliated agencies, the Association serves the religious needs of approximately 10 million persons. The Association recognizes the danger imposed by the State of California's legal position to the freedom of these individuals as well as all Americans and is vitally concerned with countering that threat.

9. The Northern California Ecumenical Council is a regional body representing the local council of churches and ecumenical agencies together with representatives of the fourteen participating judicatories which make up its Council Board. It is the most broadly representative body of the Protestant community in Northern California and is actively concerned with the defense of religious freedom.

Consent to the Filing of the Attached Brief Amici Curiae Has Been Requested of the Parties but Refused by Respondent State of California.

The consent of the parties to the filing of the attached brief has been sought by the moving parties. However, while petitioners gave their consent, the respondent Attorney General of the State of California refused such consent. Amici, accordingly, proceed by this motion.

Amici Organizations Represent a Major Portion of This Country's Christian and Jewish Religious Community, and as Such, Are Particularly Qualified to Represent to the Court the Detached and Authoritative Viewpoint of This Large and Diverse Constituency.

The above amici curiae consist of established church bodies and umbrella organizations representing a constituency of over 80 million Americans and members of this country's religious community. As such, they are uniquely qualified to represent to this Court the views of this large and diverse constituency on the vital issues presented by the petition herein.

These amici curiae are not parties to the subject action, nor have they been involved in any of the activity alleged to form the basis for the action instituted by California's Attorney General. Neither do they believe that the religious protections of the first amendment may be used to protect wrongdoing. They are concerned, however, that these protections not be breached in pursuit of wrongdoers when other, less perilous alternatives are available.

The issues tendered by the pefition in this case touch upon the core of religious liberty and the fundamental interest of these amici. Throughout their histories, they have been devoted to the maintenance of these freedoms and to the defense of the individual's right to hold and pursue beliefs of his own free choice. Their long experience and representative viewpoints are, they submit, of unique and particular value to the Court in assessing and evaluating the character and urgency of the matters here at issue.

Amici believe that it is not just the rights of the Worldwide Church of God and its members that are threatened by the State of California's action, but those of every religious body and every American. They are concerned that the Attorney General's claimed power to supervise religious institutions will, if upheld, have drastic consequences on traditional religious freedoms and will point the way toward the adoption of state established standards of religious observation and practice.

Therefore, these amici strongly support the petition of the Worldwide Church of God et al. and urge that this Court accept and consider their accompanying brief, which describes and develops the bases and reasons for that support.

Respectfully submitted,

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Attorney for Amici Curiae.

Of Counsel:
JOHN W. BAKER,
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JOHN E. STUMBO.

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INTRODUCTION.

This brief is respectfully submitted in behalf of the following church and synagogue associations.[1]

National Council of Churches of Christ in the U.S.A.

Synagogue Council of America

Baptist Joint Committee on Public Affairs

Lutheran Church in America

Association of Evangelical Lutheran Churches

Board of Church and Society, The United Methodist Church

William P. Thompson, Stated Clerk of the General Assembly of the United Presbyterian Church in the U.S.A.

National Association of Evangelicals

Northern California Ecumenical Council

The aggregate constituency represented by these associations totals in excess of 80 million Americans. The constituents differ among themselves as to the appropriate or most appropriate way to worship or express reverence to God. The ecclesiastical structures of the associations differ: some are hierarchical, some congregational. Their legal structures differ too: some are unincorporated, some are incorporated under religious corporations laws, some are corporations sole, and some, like the Worldwide Church of God, are organized under general corporation statutes.

What unites them in the submission of the brief is a conviction that when the technicalities of statutes designed to regulate ordinary corporate activities are

[1]Descriptions and statements of interest in respect of these organizations appear in the attached motion for leave to file brief amici curiae, to which the Court's attention is respectfully invited.

used and abused as instrumentalities to destroy a religious association which may be in governmental disfavor at a particular time, the result is a threat to the security of all religions. A religion favored today may be disfavored tomorrow, and no religion is secure unless all are secure.

Religious freedom is the precious heritage of all. Because they feel that the actions of the Attorney General of California threaten that heritage and their own security, the associations joining in this brief respectfully submit it to this Court.

STATEMENT OF THE CASE.

Basically, the substance of the unfortunate litigation is this. The Attorney General of California, acting for the state, has declared that churches and religious organizations are public, charitable trusts accountable to the state and consequently, that:

1. All church or synagogue property is deemed to be public property, rather than being owned by the church or synagogue or its members, and is therefore subject to supervision, regulation and control by the state;

2. All church or synagogue records are public records and are subject to audit and review by the state, whether or not there is reasonable ground for its action;

3. The state may, with or without cause, compel a church or synagogue to account for all of its income and expenditures so that the state may determine if its funds are being used for proper religious purposes;

4. Church or synagogue officials are public trustees who serve as agents of the state and may be removed and replaced by the state at will;

5. The state has the authority to require the reorganization of internal church structures from hierarchical to congregational form;

6. The state may appoint a receiver to take possession of all church or synagogue property and records and supervise operations until the litigation is finally determined, no matter how long that may take; and

7. The state may conduct ongoing investigation as a means of accomplishing all or any of the foregoing objectives.

Basically, the Attorney General claims an inherent common law power (originating in England long before the first amendment became part of our Constitution), reinforced by statute, to supervise, manage and control a church or synagogue on the theory that it is a ward of the state and that its affairs and operation are subject to unlimited and continuing control by the state acting through its Attorney General.

Pursuant to the foregoing doctrine, the Attorney General, upon the relation of six dissident members, filed this lawsuit against the Worldwide Church of God, its principal leaders, and other defendants seeking to compel an accounting by having the Court order the Church to submit to an examination, audit and general investigation of its affairs.

The lawsuit sought to invoke the state's judicial system in order to force disclosure not only of all the assets of the church, but of its activities and operations in the carrying out of its sacred mission. Moreover, in addition to its inquisition, the lawsuit sought to remove and replace the Church leaders and trustees and to restructure the Church organization. The ancillary remedies of receivership and injunction were asked in aid of these objectives.

A receiver (not baptized in the Church) was appointed ex parte and placed in complete charge of the Church for approximately seven weeks, following which the receivership was suspended by the posting of a stay bond upon the Church's appeal.

Subsequently, the Attorney General turned to civil discovery as a means of enforcing his examination and secured a series of sweeping orders from the Court directed against the Church and its principal officers. Among the orders issued pursuant to the Attorney General's demands, for example, was one compelling Herbert Armstrong, the 87-year-old founder and patriarch of the Church, to appear for interrogation and to bring with him every scrap of paper he had accumulated over the many years that he had led the Church.

These defendants, by their petition to this Court, seek review of these orders.

QUESTION PRESENTED.

The question dealt with in the brief is whether the action of the state through its Attorney General, as has been set forth, can be reconciled with the mandate of the first amendment forbidding laws respecting an establishment of religion or prohibiting its free exercise.

SUMMARY OF ARGUMENT.

This case presents a startling and, we believe, unprecedented situation in the history of church-state relations under a constitution that forbids the establishment and secures the free exercise of religion. The state-authorized actions of the Attorney General are predicated on the assumption that a thriving, completely solvent

church with an enviable credit rating, enjoying the full support of the overwhelming majority of its membership, can be taken over and managed by state officials as if it were a failing business corporation unable to meet its debts or pay its workers.

The action challenged herein, sanctioned by California's courts, violates the first amendment's ban on laws respecting an establishment of religion in that it constitutes impermissible state participation in religious affairs, its purpose and primary effect are the inhibition of religion, and its action results in excessive government entanglement with religion.

The action of the State violates the free exercise clause of the amendment in that the State has not established, nor can it establish, the existence of an interest sufficiently compelling to justify infringement upon the congregants' right to the free exercise of their religion in determining how and by whom their affairs shall be governed and their voluntary contributions expended.

ARGUMENT.

I.

THE ACTION OF THE STATE OF CALIFORNIA THROUGH ITS ATTORNEY GENERAL VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

A. Introduction.

Recently, in *National Labor Relations Board v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Court said (at page 504):

> The church-teacher relationship in a church-operated school differs from the employment relationship in a public or other non-religious school. We see no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow.

Although this quotation was dictum in the decision, we quote it to indicate that just as an undoubtedly legitimate governmental interest in labor relations must yield to the higher commands of the first amendment's religion clauses, so too must its asserted interest in protecting the assets of a non-profit corporation.

Unlike the situation in cases involving business corporations or charitable organizations, governmental intrusion into the affairs of churches affect grave constitutional concerns in respect to the integrity of religious institutions and the underlying concept of the establishment and free exercise clauses. Nothing in the first amendment or elsewhere in the Constitution forbids a state from operating a business, or even a school so long as it is not a religious school; our public school systems are predicated on that assumption.

Should, however, this Court sanction operation of a church by a public official, it certainly could operate a parochial school, a result which is clearly contradictory to the principle set forth in our quotation from *Catholic Bishop,* and certainly could not be reconciled with the principles of constitutional law emanating from *Pierce v. Society of Sisters,* 268 U.S. 510 (1925).

B. The Meaning of the Establishment Clause.

1. The Everson Test.

In *Everson v. Board of Education,* 330 U.S. 1, 15 (1947), and later cases,[2] the Court defined the establishment clause in the following language:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups

[2] *McCollum v. Board of Education,* 333 U.S. 203, 210-211 (1948); *McGowan v. Maryland,* 366 U.S. 420, 430 (1961); *Torcaso v. Watkins,* 367 U.S. 488, 493 (1961).

> and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."

It is impossible to reconcile the position of the State of California with this language. If the State is not setting up a church it is certainly taking one over and operating the Worldwide Church of God with the same authority and powers exercised in respect to a church which it sets up. It is forcing and certainly influencing its members to remain away from the church of their choice and forcing upon them choices and actions regarding their church which they clearly would not take of their own volition. Above all, it is not secretly but openly participating in the affairs of a religious organization.

It is, of course, no answer that the State of California, through its Attorney General, may at the present time be liberal in allowing the religious leaders of the Church to conduct what the Attorney General deems to be the purely religious activities of the Church. The state has by no means conceded that it is constitutionally forbidden to do otherwise. On the contrary, it has gone so far as to employ an excommunicated former member of the Church as its chief administrator and has asserted the right to determine which Church programs and ministers should be continued and which terminated. The action it has taken may not shock the conscience of the Attorney General, but it does shock the conscience of the millions of Americans in whose behalf we submit this brief.

2. The Purpose-Effect-Entanglement Test.

Beginning with *Walz v. Tax Commission*, 397 U.S. 664 (1970), and *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and later cases,[3] the Court has expressed the meaning of the establishment clause in language which is somewhat different from that used in *Everson* and the other cited cases, but which is the same in basic substance.[4] In these cases the Court has interpreted the clause to mean that in order to pass constitutional muster, the statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive entanglement with religion.

What the Court did in *Walz* and the later cases was to add that, independently of purpose and effect, excessive entanglement with religion violates the establishment clause.

There can be no doubt that if a state law or action fails in respect to any of the prongs of this three-part test it violates the first amendment irrespective

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[3]*Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Wolman v. Walter*, 433 U.S. 229 (1977); *New York v. Cathedral Academy*, 434 U.S. 125 (1977).

[4]Indeed, the purpose-effect-entanglement test had its origin in *McGowan v. Maryland, supra*, where, as noted, the Everson test was quoted and relied upon. Chief Justice Warren's opinion for the Court concluded with the following paragraph.

> Finally, we should make it clear that this case deals only with the constitutionality of §521 of the Maryland statute before us. We do not hold that Sunday legislation may not be in violation of the "Establishment" Clause if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion.

of its relationship to the other two. *See, Epperson v. Arkansas*, 393 U.S. 97 (1968), [purpose]; *Nyquist, supra*, [effect]; *Lemon, supra*, [entanglement]. In the present case the action of the State of California through its Attorney General fails in respect to all the three prongs.

a *Purpose.* Laws financing bus transportation to religious schools, upheld in *Everson*, obviously have a secular purpose, that of protecting the safety of children. Laws financing secular instruction in church-related schools likewise have a secular purpose, that of providing pupils with the equivalent of a public-school education in respect to non-religious subjects, although they are unconstitutional by reason of effect or entanglement. We are, however, unable to see what purpose the State's action in this case can have other than the inhibition of the religion professed by the Worldwide Church of God and its members.

The State claims that it is merely acting to prevent fraud. But this it may not do in anything touching the profession and practice of religious doctrine as between a church and its congregants.

In *United States v. Ballard*, 322 U.S. 78 (1944), the Court, with only one dissenter, held that no agency of government has constitutional competency to pass upon the validity of religious profession even when prevention of fraud is asserted to justify its intervention. In language particularly applicable to the present case, the Court there said (at pages 86-87):

> Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible

to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom. . . . The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.

If, on the other hand, criminal conduct is charged, such as embezzlement or theft, then prosecution of the wrongdoers under criminal statutes is a full and complete remedy. Yet, that course has not been here pursued.

The Attorney General's actions in respect to the Worldwide Church of God, we submit, can hardly be explained except on the basis of a purpose to destroy it or at the very least to seriously restrict its pursuit of its religious mission because of the disfavor by him and other officials of the State of California of what it teaches and preaches.

b. *Effect.* It is even more evident and indeed incontrovertible that a principal or primary effect of the state's action is the inhibition of the religion professed by the Worldwide Church of God and its congregants. Here, too, it is not easy to discern any effect other than that of inhibition if not complete destruction. In our "Statement of the Case" part of this brief, we have set forth some of the actions which the Attorney General has already taken and the California Court has refused to enjoin. He has treated as public property all the assets owned or leased by the Church, including premises used for prayer and worship, and asserts that it is all subject to supervision, regulation and control by the state. He has made and acted on the claim that Church officials are public trustees who serve at the will of the state and may be removed by the state at will. Can it be doubted that the effect of these actions is the inhibition of the religion of the Church and its congregation?

The voluminous record in this case discloses many other instances of governmental action having the effect of inhibiting the Church, its officials and its congregants. The Attorney General's frustration of the attempted sale of property owned by the Church so that the proceeds could be used more effectively in furtherance of its religious mission obviously inhibited its exercise of religion. Even more damaging has been the acute disruption and curtailment of vital Church programs by reason of the Attorney General's actions. It is difficult to assess the full extent of the substantial injury suffered by the Church by reason of the state's intervention into an area where it is forbidden to trespass by the mandate of the first amendment.

c. *Entanglement.* The most flagrant violation of the mandate of the establishment clause in the state's war against the Worldwide Church of God deals with the prohibition of entanglement with religion. Governmental entanglement with the religion of the Church is manifest in practically every step the State of California has taken in its real, if perhaps not officially declared, war against the Church. The very appointment of a receiver to manage and control the operation of a church reeks of excessive entanglement. A receiver can, of course, be appointed for a manufacturing or other business organization without violating the constitutional mandate. Nor would the establishment clause be violated by the appointment of a receiver to liquidate the assets of a defunct church or synagogue. But the idea of a state-appointed official controlling the functions and operations of a live, ongoing church is frightening.

Should the California Court appoint a receiver who is of the same faith as that of the congregation? Should a court do so, it would violate the mandate in Article VI of the Constitution against religious tests for public office, a mandate no less binding upon the states, by reason of the first and fourteenth amendments, than upon the federal government. *Torcaso v. Watkins,* 367 U.S. 488 (1961); *McDaniel v. Paty,* 435 U.S. 618 (1978). On the other hand, should the Court seek to appoint a person of a different faith (as was done here) or one whose faith is undisclosed to it in order that the ban on religious tests not be violated, can it be sure that the appointee's hostility to the faith and the church propounding it would nevertheless enable it to make the necessary decisions with complete impartiality? One could hardly

expect dispassionate impartiality from, say, a militant atheist.

How can the Court disentangle decisions relating to the cost of fuel needed to heat a church and the compensation paid to its pastor, sexton or choir members? Should the pastor decide that a newly-published prayer book be used, should the receiver have the power to veto that decision on the ground that the prayer books in use are in good condition and not really different in any significant way from the new prayer book?

Suppose, after a schism in a church, such as happened in the present case, a bishop entertains doubts as to the continued loyalty of a particular minister: can the receiver veto the bishop's decision to dismiss the minister before his contract expires because the added cost of a substitute minister would constitute a waste of the church's assets?

Because of the restrictions placed upon government officials, judges or attorneys general by the first amendment's mandate against entanglement (as well as its guaranty of free exercise), judicial intervention in intra-church disputes and schisms is strictly limited. *Watson v. Jones,* 13 Wall. (80 U.S.) 679 (1872); *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94 (1952).

We will shortly discuss these cases more fully in Point II of this brief. We refer to them here only to emphasize that where a secular court intervenes in an intra-church dispute the consequence is impermissible entanglement. In the present case, a small dissident minority in the Worldwide Church of God instigated the action and cooperated with the Attorney General in the latter's action against it. Indeed, their private

attorney bore the brunt of the effort for the state during the first several weeks, acting under cover of state authority as a "Special Deputy" Attorney General. But even if this were not so, self-initiated governmental intervention as shown by the record in this case presents constitutionally forbidden entanglement of Church and state.

In short, whether the state's concern relates to the substance of the church mission or the manner in which it fulfills that mission, its involvement to enforce disclosure of church records or its control and management of the church itself inevitably results in entanglement of church and state.

II.

THE ACTION OF THE STATE OF CALIFORNIA THROUGH ITS ATTORNEY GENERAL VIOLATES THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

A. Governmental Assaults on Unpopular Religions.

It was and is the purpose of the first amendment's guarantee of religious freedom to protect unpopular creeds and faiths, including those who for some reason or other have lost favor in the eyes of government officials. The heart of the first amendment would be mortally wounded if a comparatively small religious association, such as the Worldwide Church of God, were excluded from its protection because of its disfavor in the eyes of the Attorney General of the State of California.

The Worldwide Church of God is not the first (and unfortunately will not be the last) to suffer governmental discrimination because of its unpopularity:

> In this country, [the Court said in *Watson v. Jones, supra*] the full and free right to entertain a religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all individual members, congregations, and officers within the general association, is unquestioned. [13 Wall. (80 U.S.) at 728-729 (1872)].

In *Kedroff v. St. Nicholas Cathedral, supra,* another case involving a church schism such as the one that sparked the present controversy, the Court, in referring to *Watson v. Jones,* said at p. 116:

> The opinion radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrines. Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.

The Court concluded its opinion saying:

> Ours is a government which by the "law of its being" allows no statute, state or national, that

> prohibits the free exercise of religion. There are occasions when civil courts must draw lines between the responsibilities of church and state for the disposition or use of property. Even in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls. This under our Constitution necessarily follows in order that there may be free exercise of religion. (344 U.S. at pp. 120-121).

The California Attorney General was not the first governmental official to utilize facially neutral laws relating to corporations as an instrument for the persecution of a particularly disfavored association. The case of *NAACP v. Alabama,* 357 U.S. 449 (1958), is in some aspects remarkably similar to the present controversy. There this Court dealt with a law which, like the one here involved, was neutral on its face and was enacted to protect the people in relation to the activities of commercial and business corporations by requiring disclosure of officers and members. As in the present case, the state Attorney General resorted to that law for the entirely alien purpose of destroying, at least in Alabama, an unpopular national organization. The Court refused to allow use of Alabama's corporation law to effectuate that purpose, and we believe it should not here allow the use of California's law for the same purpose.

The persecutory tactics employed by the Attorney General in this case are aimed not against a disfavored racial association but a religious one. But such tactics were employed against unpopular religious groups long before they were rebuffed in *NAACP v. Alabama.* The history of the struggle for religious freedom in

the United States is in large measure a chronicle of governmental efforts to utilize facially neutral laws to suppress unpopular religions and sects. Even if the ban on bills of attainder, the first amendment's guaranty of religious freedom, and the fourteenth amendment's mandate of equal protection were not insurmountable barriers to outright suppression of the Worldwide Church of God or similar disfavored groups, the conscience of the American people would never allow such action. Hence, the resort to facially neutral laws to achieve the same result.

A facially neutral compulsory school attendance law was utilized in Oregon during the post-World War I period as an instrument of the politically powerful Ku Klux Klan anti-Catholic bigotry, manifested in its efforts to destroy the parochial school system. G. Myers, *History of Bigotry in the United States* (1943), p. 293. That effort was frustrated only by the Court's decision in *Pierce v. Society of Sisters,* 268 U.S. 510 (1925).

Jehovah's Witnesses have been frequent victims of the use of facially neutral laws against unpopular religions in the exercise of their first amendment rights under the free exercise clause. For example, a law forbidding girls under the age of eighteen to sell newspapers or periodicals in public was used against a member of the sect who, under the command of her religious conscience, allowed her children to accompany her while she sold or distributed free the sect's religious publications. See *Prince v. Massachusetts,* 321 U.S. 158 (1944).

In *Cantwell v. Connecticut,* 310 U.S. 296 (1940), the Court struck down not only the conviction of

members of the sect for violation of the common law offense of inciting a breach of the peace, but also a facially neutral statute requiring a license for solicitation of contributions for religious, charitable and philanthropic causes.

Today, Jehovah's Witnesses are an accepted member of the family of American faiths. They reached that enviable station only after a period of trials and tribulations instigated by government officials, hostile to what they believed in and practiced. New laws were enacted and old laws resurrected to supply weapons to curb their activities and, if possible, completely destroy them. All kinds of laws were used or attempted to be used for that purpose; laws against disturbing the peace, antipeddling ordinances, laws against the use of sound trucks, traffic regulations, revenue laws—these and many others were invoked in one way or another against them. See, generally, R. Manwaring, RENDER UNTO CAESAR (1962) *passim;* H. Barber, *Religious Liberty v. Police Power: Jehovah's Witnesses,* AMERICAN POLITICAL SCIENCE REVIEW (April 1947).

The one device apparently not used against the Witnesses was invocation of statutes authorizing state officials to take over the sect's properties and assets as part of a campaign to destroy the sect completely. That device appears to have been conceived by the California Attorney General in his campaign to destroy the Worldwide Church of God.

B. Constitutional Restrictions on Free Exercise.

It need hardly be argued that the Attorney General's actions in respect to the Worldwide Church of God restricts the free exercise of religion on the part of its congregants.

In earlier cases, the Court applied the clear and present danger test, formulated in respect to freedom of speech, to claims of violation of the free exercise clause. *Cantwell v. Connecticut, supra.* Under present interpretations of the clause, government, state or federal, can restrict the expression or exercise of religion only by showing (1) that there is a countervailing governmental interest of such importance as to be deemed compelling, and (2) that there is no alternative for its implementation other than a limitation on the free exercise of religion. *Wisconsin v. Yoder,* 406 U.S. 205 (1972).

Thus, while the Court had upheld compulsory smallpox vaccination over a claim of religious opposition, *Jacobson v. Massachusetts,* 197 U.S. 11 (1905), it held that the free exercise clause gives parents acting on religious grounds the right to remove their children from schools at an age earlier than that sanctioned by a state's truancy laws, *Wisconsin v. Yoder, supra,* and that a state may not constitutionally deny unemployment compensation to a person who refuses to accept employment which would require him to work on his Sabbath. *Sherbert v. Verner,* 374 U.S. 398 (1963).

In *National Labor Relations Board v. Catholic Bishop,* from which we have quoted, the Court quite clearly expressed its view that governmental interest in collective bargaining by employees cannot be deemed

sufficiently compelling to justify intrusions upon the free exercise of religion.

Finally, in *United States v. Ballard,* from which we have also quoted, the Court held that in the absence of proof that a specific factual representation was known to be false when made (a claim not asserted by the Attorney General or anyone else in the present case), the first amendment forbids any agency of government to pass upon the validity of any religious tenet or representation, and from taking action against anyone for expressing it.

We conclude our brief with the following quotation from the dissenting opinion of Mr. Justice Rutledge in *Prince v. Massachusetts,* 321 U.S. at 175-176, a quotation which, coming from a decision involving Jehovah's Witnesses, is no less applicable to the World-wide Church of God and to all other faiths that have come into the disfavor of this or that governmental official:

> No chapter in human history has been so largely written in terms of persecution and intolerance as to the one dealing with religious freedom. From ancient times to the present day, the ingenuity of man has known no limits in its ability to forge weapons of oppression for use against those who dare to express or practice unorthodox religious beliefs. And the Jehovah's Witnesses are living proof of the fact that even in this nation, conceived as it was in the ideals of freedom, the right to practice religion in unconventional ways is still far from secure . . . . [T]hey have been harassed at every turn by the resurrection and enforcement of little used ordinances and statutes. . . . To them, along with other present-

> day religious minorities, befalls the burden of testing our devotion to the ideals and constitutional guarantees of religious freedom. We should therefore hesitate before approving the application of a statute that might be used as another instrument of oppression. Religious freedom is too sacred a right to be restricted or prohibited in any degree without convincing proof that a legitimate interest of the state is in grave danger.

CONCLUSION.

For the reasons set forth herein the petition for certiorari in the present case should be granted and the judgment of the Court of Appeals of California be reversed.

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